No. 13,313

In the
United States Court of Appeals
For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co., *Appellants*,

— vs. —

A. E. OWENS, FERN OWENS and R. F. OWENS, co-partners, doing business as Owens Brothers, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT, TERRITORY OF ALASKA, THIRD DIVISION

APPELLEES' PETITION FOR A REHEARING

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska.

CHADWICK, CHADWICK & MILLS,
656 Central Bldg., Seattle 4, Wash.

JOHN E. MANDERS,
Anchorage, Alaska.

Attorneys for Appellees.

THE ARGUS PRESS, SEATTLE

No. 13,313

In the
United States Court of Appeals
For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co., *Appellants*,

— vs. —

A. E. OWENS, FERN OWENS and R. F. OWENS, co-partners, doing business as Owens Brothers, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT, TERRITORY OF ALASKA, THIRD DIVISION

APPELLEES' PETITION FOR A REHEARING

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121, Juneau, Alaska.

CHADWICK, CHADWICK & MILLS,
656 Central Bldg., Seattle 4, Wash.

JOHN E. MANDERS,
Anchorage, Alaska.

Attorneys for Appellees.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

TEXTS

STATUTES

In the

United States Court of Appeals

For the Ninth Circuit

JACK C. ANDERSON, SR., and JACK C. ANDERSON, JR., co-partners, doing business as Anderson & Son Transportation Co., *Appellants*, vs. A. E. OWENS, FERN OWENS and R. F. OWENS, co-partners, doing business as Owens Brothers, *Appellees.*	No. 13,313

UPON APPEAL FROM THE DISTRICT COURT, TERRITORY OF ALASKA, THIRD DIVISION

APPELLEES' PETITION FOR A REHEARING

To the Honorable William Denman, Presiding Judge and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees respectfully petition this court for a rehearing of this cause and present the following specifications of error in its decision as ground for the granting of such petition:

I.

Failure to discuss the point argued and briefed on appeal to the effect that the judgment of the District Court should be affirmed upon the basis that the parol evidence was properly admitted on the question of fraud which was pleaded and proved.

II.

In ruling that an implied warranty of fitness cannot arise from sale of a specific item of personal property.

I.

Fraud on the Part of the Appellants Was Pleaded and Proved. Parol Evidence Is Always Admissible for the Purpose of Proving Fraud So that the Judgment of the Trial Court Should Be Affimed or, in the Alternative, the Case Remanded to the Trial Court for Further Findings on the Issue of Fraud.

The essential elements of actionable fraud are that "representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." 23 Am. Jur. 773; 37 C.J.S. 215.

In their complaint appellees set forth that appellants made representations of fact, knowing them to be untrue with intent to deceive and for the purpose of inducing the appellees to act thereupon, and that appellees were misled and damaged thereby (See Paragraphs III and VIII of Complaint, Tr. 4, 7).

The evidence amply proved these allegations of fraud. Thus it was proved that representations were made as to the condition of the hull and engine of the vessel which appellants either knew to be untrue or made recklessly. Moreover, the elements of fraud are either spelled out or may be inferred from the opinion of the court below. The court found:

> "Anderson replied that the tug was in fair condition with the exception that the crankshaft pin for No. 5 cylinder was scored and that the forefoot or the stem was damaged from striking

a log on the trip to Seattle, but that the vessel did not leak." (Tr. 34)

The court found the facts in regard to the vessel to be as follows:

"An inspection of the engine by the witness Engstrom, the mechanical expert of the Fairbanks-Morse Company, presumably the manufacturer of the engine, disclosed that all the main bearings were ruined and the main bearing journals scored and ⅛ inch over the original shaft diameter; that the drive gear was useless because of several broken teeth; that the water pump was completely obstructed; that the salt and fresh water pump shafts were bent and the bearings ruined; that the crank shaft was warped from excessive heat and no longer useful; that the oil columns were clogged with babbitt from the bearings and totally obstructed and that a makeshift oil line had been installed to provide lubrication. The base of the engine was also warped from excessive heat. Engstrom testified that the warping of the base of the engine and the crankshaft was caused by heat of such intensity as could be generated only by a fire ignited in the base from friction as a consequence of a total lack of lubrication.

"The vessel was then placed in a dry dock, where an inspection revealed that the lower part of the stem, the entire forefoot, the forward end of the keel and the ends of the adjacent planks were almost completely splintered, that the stem plate hung by one end and that the forward watertight compartment was filled with water. It was also discovered that the tail shaft was oxidized from galvanic action or electrolysis to such an extent as to require replacement; that

> the battery required new plates; that the stuffing box was beyond repair and that the winches were frozen in consequence of rust and lack of lubrication." (Tr. 35, 36)

With reference to the statement that the vessel had struck a log on the trip to Seattle, the court found:

> "It was proved that instead of striking a log which would have caused relatively little damage to a tug of this size, the tug had struck a rock, and from the photographs of the bow, plaintiffs' exhibits Nos. 9 and 19, I am convinced that so much damage could not have resulted unless the vessel struck at full speed. The testimony of the defendant Anderson as to this incident was such as to seriously affect his credibility." (Tr. 36)

It is true that the court does not specifically find whether or not the false statements in regard to the condition of the engine, hull and the striking of an object on the trip south were made with a knowledge of their falsity or, in the alternative, recklessly. It would appear, however, that the facts in that connection speak for themselves. Certainly the representation that the vessel had hit a log on the trip to Seattle when actually it had rammed into a rock so forcibly as to demolish the bow below water line was a wilfully false statement and the element of knowledge necessarily is implied from the other findings of the trial court (See Findings of Fact 3 (Tr. 42), 7 (Tr. 43), 16, 17, 18 (Tr. 44), 20,21 (Tr. 45)).

Moreover the court found that these representations induced the Appellees to purchase the vessel and that the vessel was purchased in reliance thereon (Conclusion of Law 3 (Tr. 47)).

Thus the only requirement of fraud not fully expounded by the trial court in its findings of fact is that of knowledge on the part of appellants of the falsity of their statements, and as pointed out above this finding is necessarily inferred from the others made by the trial court. If this honorable court feels that there is any question on that issue or on any other factor involved in fraud, it is respectfully suggested that justice requires that the case be remanded to the trial court for additional findings.

> "If a judgment in an equity case or an action at law tried by the court is reversed, and an unsolved question of fact must be determined before judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering the right solution doubtful, the reviewing court will remand the cause to the trial court, with directions to determine such issue and then to apply the law to the case. This must be done where the jurisdiction of the reviewing court is strictly appellate, and it is not allowed to make findings of fact. Where the trial court has failed to make a finding upon a material issue or fact submitted to it for trial or for determination, or has made findings which are mere recitals of evidence with conclusion of facts, lack precision, and mix facts with inferences, or are ambiguous, the reviewing court will generally remand the case with directions to make proper findings, and where the case calls for findings in addition to those made, or the findings made are not sufficiently specified, the case will be remanded for additional findings, and where the trial court omits to make a finding of fact which covers the issue as to damages, the review-

> ing court will remand the case for a new trial, being unable to render a judgment for the plaintiff for any specific amount of damages. When, however, facts not controverted are admitted, or have been assumed by both parties, the failure to make findings thereof does not necessitate a remand." 3 Am. Jur. §1215.

There is no conflict of authority on the question of the admissibility of parol evidence in order to prove fraud, so that the question of the application of the parol evidence rule is disposed of when the case is considered on the basis of fraud (See 24 Am. Jur., Sec. 267).

In *Robinson v. Carter* (Mun. Ct. of App. for the District of Columbia) 77 Atl.2d 174, a sale of a boat under circumstances somewhat similar to the one at bar was involved, although the representations made by the seller were not nearly as patently false as those made by the appellants in the subject case. The court held:

> "Ordinarily what a contract says rather than what is in the minds of the parties should govern, but where a party is fraudulently induced to enter into a contract, the fraud cannot be rendered successful by reducing the contract to writing and then invoking the parol evidence rule."

That case involved a contract to sell a boat "as is" rather than one completely silent as to the condition of the vessel.

In the case at bar, fraud was pleaded and proved and accordingly the judgment of the court below should be affirmed or the case remanded for further findings in regard to the issue of fraud.

II.

A Breach of Implied Warranty of Fitness Was Pleaded and Proved. Under the Uniform Sales Act Implied Warranties Arise Under the Circumstances of This Case So that the Judgment Below Should Be Affirmed or the Case Remanded for Further Findings in Regard to Implied Warranty.

This learned court, in its opinion, sets forth Sec. 15 of the Uniform Sales Act (Remington Rev. Statutes, Sec. 5836-15) as follows:

> "Implied warranties or conditions as to quality or fitness. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract, to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose * * *."

The trial court found:

> "6. A. E. Owens informed the defendants that the plaintiffs were in the logging business in Alaska and desired to purchase a vessel for use in towing logs." (Tr. 43) and concluded:
>
> "2. The warranties made by the defendants were such as to induce the plaintiffs and did induce the plaintiffs to purchase the vessel in reliance thereon." (Tr. 47)

It is true that this conclusion may be regarded as

referring to paragraph one of the Conclusions of Law referring to express warranties. It may also be construed, however, to apply to implied as well as express warranties. This is especially true as the only purpose of making Finding 6 would be to show that the facts upon which an implied warranty are based were present. This is further brought out by the trial court's opinion wherein he set forth the applicable section of the Uniform Sales Act in regard to implied warranty (Tr. 38), and thereafter expressly tied the facts into that section by stating:

> "I also find that although Owens examined the vessel, it was not, nor could it have been, such an 'examination as ought to have revealed' (Sec. 15(3) Uniform Sales Act) the internal defects in the motor and the under-water damage to the hull."

If it is considered that there is any ambiguity on the question of the court's judgment being based in part on the breach of implied warranty, particularly in regard to a finding that appellees purchased the vessel in reliance "on the seller's skill or judgment," it is respectfully submitted that the case should be remanded for further findings on that point.

Apparently this learned court took the position that either such a finding is to be inferred from the trial court's Findings of Fact and Conclusions of Law, or that, in the alternative, the case should be remanded for further findings on the point if, as a matter of law, a breach of implied warranty could be found under the facts involved. The court concluded, however, that since this case involved the purchase of a specific ves-

sel the purchase could not have been made in reliance on the skill of the seller.

The case of *Long v. 500 Co.*, 123 Wash. 347, 212 Pac. 559, is cited as the principal authority for this point. That case, however, as is pointed out by the court involved a situation where the single specific article was not the subject of the contract of sale so that the Washington court's opinion in regard to sale of specific single chattels is merely dictum. Even more important is the fact that the *Long* case was decided in 1923. The Uniform Sales Act was adopted by the State of Washington in 1925. At common law it was uniformly held that sale of specific used items did not give rise to an implied warranty. That was changed with the enactment of the Uniform Sales Act. Thus it is stated in Williston on Sales, Vol. 1, Rev. Ed., Sec. 231:

> "As has been shown in the preceding section, it is more than a liberal rule of construction, it is an imposition of liability irrespective of (though not contradicting) the positive contract of the parties, to hold that there is a warranty of quality in case of a sale or contract to sell specific goods, where there is no promise or affirmation in regard to them. That such a warranty is imposed in some cases should now be well settled though in a few States the early law of *caveat emptor* seems still unqualified in sale of specific goods and occasionally early precedents confuse the statements of courts even in jurisdictions where those precedents have been practically overruled.
>
> "The reason for imposing such a liability upon the seller is that the circumstances of the bargain justify the buyer in inferring that the seller by the very act of offering his goods for sale, asserts or

> represents that they are merchantable articles of their kind or are fit for some special purpose, and that the buyer relies upon this implied assertion or representation."

In addition to the case of *Long v. 500 Co.*, cited *supra*, this honorable court has cited the case of *American Player Piano Co. v. American Pneumatic A. Co.*, 172 Iowa 139, 154 N.W. 389, 393, in support of the proposition that an implied warranty does not apply where the subject of the sale is a specific chattel. That case involved a 1910 contract of sale for the installation of a particular brand of action in pianos manufactured by the plaintiff. A reading of the case indicates clearly that it was not decided under the Uniform Sales Act. Moreover, the case involved the order of a particular invention. The defendant made the actions in accordance with specifications agreed upon in advance. That type of case, if decided under the Uniform Sales Act, would appear to come under the provision of subsection 4 which states:

> "In the case of a contract to sell or a sale of a specific article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

This exception to the statutory implied warranty is not involved in the subject case, and to extend such an exception would appear to require amendment of the legislation.

As we understand the opinion filed herein, if, as a matter of law, no implied warranty may arise from the sale of a specific single chattel, then there is no basis for affirming the judgment below on this ground. On the other hand, it follows that if an implied warranty

may arise from the sale of a specific individual chattel under the applicable law (the Uniform Sales Act adopted by the State of Washington), a factual question is then presented which lies peculiarly within the province of the trial court which is able to evaluate the testimony, so that the judgment below should either be affirmed or the case remanded for further findings.

It is respectfully submitted that a study of Section 15 of the Uniform Sales Act and cases decided thereunder leads inescapably to the conclusion that an implied warranty may be found under the circumstances involved in the subject case and that the decision in that regard is one best to be left to the trial court which has had the opportunity to hear the witnesses and study their demeanor on the witness stand and thus is best able to determine from all circumstances whether the buyer relied on the seller's skill and judgment.

Thus in the case of *Singleton v. Dunn*, 71 Ariz. 150, 224 P.2d 643, it was held that an implied warranty applied to a specific single chattel. Defendants were digging a well when plaintiffs approached them and informed the defendants that they were interested in going into the well digging business. After some negotiations, they purchased the specific well digger which the defendants were using as well as various parts which were shown them. The court, in finding for the plaintiffs, held:

> "In the instant case no efficient inspection was made although the jury could have found that opportunity was present. * * * To hold under the circumstances that the mere opportunity to inspect precludes justifiable reliance by the buyer on the

> skill and judgment of the seller and thereby forecloses the existence of this warranty would be a failure to do justice. *Drumar Mining Co. v .Morris Ravine Mining Co.*, 33 Cal. App.2d 492, 92 P. 2d 424."

In the *Drumar Mining Co.* case cited, *supra*, the defendant bought a gold washing machine after the defendant's president observed it in operation. As a defense to a suit for the purchase price, breach of the implied warranty of fitness was argued. Although the case dealt with a specific chattel, the court found that the defendant made known the purpose for which he intended to use it and relied on plaintiff's skill and judgment, and consequently judgment for the defendant was affirmed, the court stating:

> "There is no question but that the machinery was known by the purchaser to be used or second hand machinery and that defendant's agent had ample opportunity to see the same." 92 P.2d 427, and
>
> "An inspection without an operative test could determine nothing as to its fitness. The seller, to the buyer's knowledge, had made this test and the seller well knew the purpose and requirements of the buyer, and the buyer relied, and had a right to rely on the seller's skill and judgment. In such a case, it would appear that substantial justice requires the raising of an implied warranty."

Similarly, in the case at bar where the sellers knew of the buyer's purpose in purchasing the vessel and that his inspection without operative tests and placing the vessel in dry dock could determine nothing as to its fitness, the buyer had the right to rely on the seller's skill and judgment. Surely the Uniform Sales Act has

alleviated the harshness of the old doctrine of caveat emptor at least to the extent of preventing the sale without full disclosure of a vessel which had been run at full speed into a rock and had its bow below the water line to all effects demolished, and its engine all but ruined, to a buyer who has made known his purpose in purchasing the vessel and had not made such an examination as ought to have revealed these defects.

In *Savoie v. Snell* (La.) 35 So.2d 745, a specific automobile with a cracked engine block was sold to the defendant. Apparently the defect was not known by the seller at the time that the sale was made. Nevertheless, the court held that there was an implied warranty that the vehicle was fit for the purpose intended in the absence of an express waiver of the warranty. The Louisiana statute varies slightly from the Uniform Sales Act, but the same principal would seem to apply. See also *Kuhlman v. Purpers* (La. App.) 33 S.2d 84.

In *Regula v. Gerber* (Ohio) 70 N.E.2d 662, defendant purchased a second hand automobile from the plaintiffs, after being shown the specific vehicle. The court held:

> "There is nothing in the Uniform Sales Act, Sec. 8381 to 8456, inclusive, of the General Code, declaring there is no implied warranty in the sale of second hand chattels. It is specifically provided in Sec. 8395, G.C., that there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except (then this general statement is followed by several exceptions).
>
> "It is therefore quite clear that the legislature

> intended this section to apply to all sales of goods, whether new or second hand, which would include the sale of second hand automobiles."

See also *Bouchet v. Oregon Motor Car Co.*, 78 Ore. 230, 152 Pac. 888, to the same effect.

In the case of *Wallower v. Elder* (Sup. Ct. of Colo., 1952) 247 P.2d 682, the effect of the Uniform Sales Act on the question of an implied warranty arising on the sale of a specific single chattel is well illustrated. Elder sold to Wallower a used Chrysler motor and used grinder to be placed upon a trailer with other equipment to be used in connection with a hay dryer also purchased. The Chrysler motor and grinder were on hand at the time the sale was made and the specific items were purchased.

In referring to Section 15 of the Uniform Sales Act, the court stated:

> "Nothing could be clearer than that the terms of the Act are directed to the sale of all chattels. There is no exclusion of used goods in the defition of property to be covered by the Act and when the trial court ruled that the Act did not apply as to used or second hand goods, it was equivalent to reading into the statute an exception which the legislature, in its sole province, did not see fit to do."

The court found:

> "The evidence shows that the motor was started and run idle for a short time in Wallower's presence, but it is also disclosed that at no time did Wallower have an opportunity to inspect the motor when operating under a load which would develop defects that would not show up while idling."

This reference is quite analogous to the cursory inspection made by the appellees in the case at bar without the benefit of a full examination of the motor or an examination of the hull in dry dock.

In affirming judgment for the buyer in the *Wallower* case, the court stated:

> "Wallower would have been justified in relying upon the seller's representation and judgment in the matter, but if this question was in the least doubtful, it was for the jury to settle, and it determined that fact in Wallower's favor. We believe that the testimony supports the finding of the jury that there could be an implied warranty under the circumstances. It is rather apparent that the trial court in finally determining the motion for directed verdict, after the verdict, relied upon Colorado cases which were decided before the Uniform Sales Act was adopted. It being clear that the Uniform Sales Act does cover used or second-hand chattels, and that here the buyer, not entirely by implication, but expressly, made known to the seller the particular purposes for which he desired to use the articles in question, and that he relied on the seller's judgment, there is an implied warranty that the equipment sold to him was reasonably fit for the desired purposes, and this conclusion is fortified by the jury's finding to that effect."

Similarly, in the case of *Dubinsky v. Lindburg Cadillac Co.* (Mo.) 250 S.W.2d 830, where a specific Cadillac car was purchased, the court held that there was an implied warranty of fitness.

It thus appears that the great weight of modern authority holds that, under the Uniform Sales Act, an

implied warranty of fitness may arise upon the purchase of a specific single chattel, and it is respectfully submitted that the question as to whether such warranty arises in a particular case is one to be answered by the trier of the facts.

Dated, Juneau, Alaska, June 22, 1953.

Respectfully submitted,

CHADWICK, CHADWICK & MILLS,
JOHN E. MANDERS,
FAULKNER, BANFIELD & BOOCHEVER,
Attorneys for Appellees.

By R. BOOCHEVER,
Of Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL

I, R. BOOCHEVER, one of counsel for the appellees and petitioners, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and I further certify that the same is not interposed for delay.

Dated, Juneau, Alaska, June 22, 1953.

R. BOOCHEVER,
Of Counsel for Appellees and Petitioners.